Supreme Court, U.S.
FILED
SEP 10 2001
CLERK

No. 00-878

IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

DARRYL M. BRADFORD
JOHN J. HAMILL
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

PAUL M. SMITH *
WILLIAM M. HOHENGARTEN
MICHAEL B. DESANCTIS
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

* Counsel of Record

Counsel for Respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services LLC, and Focal Communications Corp.

(additional counsel listed on inside cover)

September 10, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

RICHARD METZGER
MATTHEW BERNS
FOCAL COMMUNICATIONS CORP.
7799 Leesburg Pike
Falls Church, VA 22043
(703) 637-8700

Counsel for Respondent
Focal Communications Corp.

THOMAS F. O'NEIL III
WILLIAM SINGLE, IV
BRIAN J. LESKE
WORLDCOM, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

Counsel for Respondents
WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc. and MCImetro Access Transmission Services LLC

BEST AVAILABLE COPY

RULE 29.6 STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC state as follows:

WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.), and MCImetro Access Transmission Services LLC are all wholly owned subsidiaries, directly or indirectly, of WorldCom, Inc. WorldCom, Inc. is a Georgia corporation that, through its wholly owned subsidiaries, provides local, long distance, and other telecommunications services domestically and internationally. WorldCom, Inc. is a publicly traded company on the NASDAQ National Market under the symbols "WCOM" and "MCIT." WorldCom, Inc. has no parent corporations. No publicly held company owns 10 percent or more of WorldCom, Inc.'s stock. WorldCom, Inc. owns controlling interests in Embratel Participacoes, S.A., and Digex, Incorporated, both of which issue shares to the public.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Focal Communications Corp. states as follows:

Focal Communications Corporation, through its operating subsidiaries, provides local exchange telecommunications services, including telecommunications services to Internet service providers. Focal Communications Corporation is a Delaware corporation that is publicly traded on the NASDAQ National Market under the symbol "FCOM." No publicly held company owns 10 percent or more of the stock of Focal Communications Corporation. There are no subsidiaries or affiliates of Focal Communications Corporation that have issued equity or debt securities to the public.

TABLE OF CONTENTS

RULE 29.6 STATEMENTS i

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 2

STATEMENT 2

1. The Statutory Scheme 3

2. Nature of the Dispute 5

3. The District Court Proceedings 7

4. The Seventh Circuit's Decision 8

SUMMARY OF THE ARGUMENT 12

ARGUMENT 15

I. FEDERAL COURTS HAVE JURISDICTION TO DETERMINE WHETHER STATE COMMISSION "ENFORCEMENT" DETERMINATIONS VIOLATE THE 1996 ACT. 15

A. Ameritech Raised Federal Questions That Federal Courts Have Jurisdiction to Answer Under 28 U.S.C. § 1331. 16

B. Section 252(e)(6) Does Not Withdraw the District Court's General Federal Question Jurisdiction. 18

TABLE OF CONTENTS - continued

C. A State Commission Enforcement Decision Is a "Determination" under Section 252. 22

D. The 1996 Act Does Not Support Ameritech's View of the Complete "Federalization" of Interconnection Agreement Disputes. 28

E. The Court Should Not Misinterpret the Statute to Avoid a Purported Constitutional Issue That Is Neither Serious Nor Difficult. .. 32

II. *EX PARTE YOUNG* PERMITS THIS SUIT. 33

III. THE ICC WAIVED ANY ELEVENTH AMENDMENT IMMUNITY BY ACCEPTING THE BENEFIT OF ADMINISTERING THE ACT. 45

A. *College Savings* Reaffirms that States Voluntarily Waive Eleventh Amendment Immunity by Accepting a Federal Benefit Clearly Conditioned on Such Waiver. 46

B. Congress Properly Conditioned State Participation in the Act on Waiver of a State's Eleventh Amendment Immunity. ... 47

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

AT&T Communications v. BellSouth Telecommunications, Inc., 238 F.3d 636 (5th Cir. 2001) 38

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) ..... *passim*

Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951) 44

Alden v. Maine, 527 U.S. 706 (1999) 33, 37, 47

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 32, 33

Ardestani v. INS, 502 U.S. 129 (1991) 26

Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264 (1996) 27

Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc., 240 F.3d 279 (4th Cir. 2001), *cert. granted sub nom. Verizon Maryland Inc. v. Public Service Commission of Maryland*, 121 S. Ct. 2548 (2001) ..... *passim*

Bell Atlantic Telephone Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000) 6, 7

BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission, 240 F.3d 270 (4th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3740 (U.S. May 14, 2001) (No. 00-1699) 17, 34

Bell v. Hood, 327 U.S. 678 (1946) 16, 17

TABLE OF AUTHORITIES - continued

Page

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 20

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 16

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) 11, 45, 46

Edelman v. Jordon, 415 U.S. 651 (1974) 38

Edwards v. Balisok, 520 U.S. 641 (1997) 45

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 40

Green v. Mansour, 474 U.S. 64 (1985) 33, 35

Gully v. First National Bank, 299 U.S. 109 (1936) 16

Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981) 48

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) ..... *passim*

Illinois Bell Telephone Co. v. Illinois Commerce Commission, No. 3-98-0393, Order Granting Stay (Ill. App. Ct. June 17, 1998) 7

Iowa Utilities Board v. FCC, 120 F.3d 753 (1997), *vacated in relevant part as unripe sub nom., AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) 23

TABLE OF AUTHORITIES - continued

Page

Jackson Transit Authority v. Local Division 1285, 457 U.S. 15 (1982) 17, 29, 30

Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375 (1994) 27

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 35

Livadas v. Bradshaw, 512 U.S. 107 (1994) 37, 38

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 3, 43

MCI Telecommunications Corp. v. Illinois Bell Telephone Co., 222 F.3d 323 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001) ..... *passim*

MCI Telecommunications Corp. v. Illinois Commerce Commission, 168 F.3d 315 (7th Cir.), *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001) 8

MCI Telecommunications Corp. v. Public Service Commission of Utah, 216 F.3d 929 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001) 38, 48

Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) 21

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) 21

TABLE OF AUTHORITIES - continued

Page

Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862 (6th Cir.), *cert. denied*, 531 U.S. 816 (2000) 38

New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350 (1989) 45

New York v. United States, 505 U.S. 144 (1992) 36

O'Melveny & Meyers v. FDIC, 512 U.S. 79 (1994) 30

Papasan v. Allain, 478 U.S. 265 (1986) 34, 37

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) ..... *passim*

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) 47

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) 41, 44

Printz v. United States, 521 U.S. 898 (1997) 36, 37

Puerto Rico Telephone Co. v. Telecommunications Regulatory Board of Puerto Rico, 189 F.3d 1 (1st Cir. 1999) 50

Quern v. Jordan, 440 U.S. 332 (1979) 38

Salinas v. United States, 522 U.S. 52 (1997) 33

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1995) ..... *passim*

Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (2000) 20

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 17

TABLE OF AUTHORITIES - continued

Page

South Dakota v. Dole, 483 U.S. 203 (1987) 47, 49, 50

Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma Inc., 235 F.3d 493 (10th Cir. 2000) 22, 29, 32

Southwestern Bell Telephone Co. v. Connect Communications Corp., 225 F.3d 942 (8th Cir. 2000) 22

Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, 208 F.3d 475 (5th Cir. 2000) 22

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 16, 17, 18, 19

Stone v. INS, 514 U.S. 386 (1995) 27

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 30

United States v. Mead Corp., 121 S. Ct. 2164 (2001) 25

Verizon Maryland Inc. v. Public Service Commission of Maryland, 121 S. Ct. 2548 (2001) 12

Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868) 21

Ex parte Young, 209 U.S. 123 (1908) 13

STATUTES

5 U.S.C. § 702 ..... 36, 41

TABLE OF AUTHORITIES - continued

Page

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 ..... *passim*

28 U.S.C. § 2201 7

28 U.S.C. § 2202 7

28 U.S.C. § 2283 ..... 44, 45

28 U.S.C. § 2342(1) 5

42 U.S.C. § 405(h) 21

47 U.S.C. § 152(b) 3, 43

47 U.S.C. § 152 note (Pub. L. No. 104-104, § 601(c)) 31

47 U.S.C. § 152 note (Pub. L. No. 104-104, § 601(c)(1)) 21

47 U.S.C. § 153(41) 42

47 U.S.C. § 201(b) 4, 25

47 U.S.C. § 251(b)(5) 5

47 U.S.C. § 251(d)(1) 4

47 U.S.C. § 251(d)(3) 31

47 U.S.C. § 252(a)(1) 4, 30

47 U.S.C. § 252(b)(1) 4

47 U.S.C. § 252(e) 4

47 U.S.C. § 252(e)(2)(A) 4

47 U.S.C. § 252(e)(3) 31

TABLE OF AUTHORITIES - continued

Page

47 U.S.C. § 252(e)(4) 21, 23, 24, 28

47 U.S.C. § 252(e)(5) 4, 24

47 U.S.C. § 252(e)(6) . . . . . *passim*

47 U.S.C. § 253(b) 31

47 U.S.C. § 261(c) 31

LEGISLATIVE MATERIALS

H.R. Conf. Rep. 104-458 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124 . . . . . 31, 44

H.R. Rep. No. 104-204 (1995) 3

ADMINISTRATIVE RULINGS

In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 96-98, 99-68, FCC 01-131 (rel. Apr. 27, 2001) 7

In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 (1999), *vacated, Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) 6

TABLE OF AUTHORITIES - continued

Page

In re Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, 15 F.C.C.R. 11277 (2000) 24

IN THE

Supreme Court of the United States

No. 00-878

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

Respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services, Inc. (together, "WorldCom"), and Focal Communications Corporation (collectively, "Competitors"), through undersigned counsel, submit this brief in support of the decision of the United States Court of Appeals for the Seventh Circuit in *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), Pet. App. 6a-22a, *amended*, Order, No. 98-3150 (7th Cir. Aug. 19, 2000), Pet. App. 3a-5a. As we show, the Seventh Circuit correctly

held that federal courts have jurisdiction and authority to entertain federal law challenges to state commission determinations enforcing pre-existing interconnection agreements between competing local carriers.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 252(e)(6) to review the determination of the Illinois Commerce Commission ("ICC") for compliance with federal law.

The judgment of the court of appeals was entered June 18, 1999, and amended August 9, 1999. The petition for rehearing was denied on August 9, 2000. By order of a single Justice of this Court, Petitioners' time for filing a petition for a writ of certiorari was extended to November 28, 2000. The petition was filed on November 28, 2000, and was granted on March 5, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") filed this action in federal court against the Commissioners of the ICC ("ICC Commissioners") and several Competitors, challenging the ICC's March 11, 1998, Order enforcing various "interconnection agreements" that the Competitors and Ameritech had executed under the Telecommunications Act of 1996 ("1996 Act" or "Act"), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et*

seq.[1] Ameritech's complaint alleged, *inter alia*, that the ICC's Order violates the Act and applicable regulations of the Federal Communications Commission ("FCC"). The ICC Commissioners contend that those federal claims fall outside the statutory jurisdiction of the district court and, in any event, are excluded from adjudication in federal court by the Eleventh Amendment.

1. The Statutory Scheme

The 1996 Act fundamentally changed the regulation of the local telephone industry throughout the country. In the Communications Act of 1934, Congress left regulation of intrastate telecommunications primarily to the states. *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). The states, in turn, historically granted exclusive franchises to incumbent local telephone companies like Ameritech. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); H.R. Rep. No. 104-204, at 49 (1995).

Congress enacted the 1996 Act for the express purpose of ending this monopoly regime and promoting a competitive market for local telephone service. *See AT&T Corp.*, 525 U.S. at 371. Toward that end, the 1996 Act partially supplants state regulation and imposes a new set of substantive federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *Id.* at 371-73. Congress thus altered the prior balance of federal and

---

[1] In addition to Ameritech's interconnection agreements with WorldCom and Focal, this case concerns agreements between Ameritech and respondents Teleport Communications Group, Inc. and AT&T Communications of Illinois, Inc., which are separately represented here.

state regulatory authority in the area of local telecommunications. *Id.* at 371.

Under the Act, a new entrant that wishes to enter a local telephone market must contact the incumbent carrier to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If the two carriers cannot reach an agreement, they must ask the governing state commission to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). The results of the negotiation and arbitration process are memorialized in an "interconnection agreement" between the carriers, which is then submitted for approval to the state commission. *Id.* § 252(e).

Although the Act supplies minimum requirements that state commissions must follow in arbitrating provisions about which the parties cannot reach a negotiated agreement, parties may negotiate terms "without regard" to these requirements. *Id.* § 252(a)(1). When parties voluntarily agree to terms, a state commission may reject the terms only if they are discriminatory or against the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A); *see also AT&T Corp.*, 525 U.S. at 371-73.

Thus, in the spirit of cooperative federalism, Congress vested the FCC with the primary authority to implement the federal standards created by the Act, *AT&T Corp.*, 525 U.S. at 377-84 & n.5; 47 U.S.C. §§ 201(b), 251(d)(1), while at the same time, carving out a new, voluntary role for states in overseeing interconnection agreements. The Act in no way requires state commissions to help implement the new federal scheme. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If a state commission elects to participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6); *see also AT&T Corp.*, 525 U.S. at 378 n.6 ("there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel"). If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *See* 28 U.S.C. § 2342(1).

2. Nature of the Dispute

This case concerns one aspect of the parties' interconnection agreements, "reciprocal compensation," which is the payment that a local carrier receives for completing a call for another local carrier. With local competition, customers of one local carrier will call customers of another. Carriers must therefore assist each other in delivering calls. When a customer of one local carrier makes a call to a customer of another local carrier, only the caller pays its carrier for the telephone services, leaving the other carrier uncompensated. The caller's local carrier therefore must compensate the other carrier whose facilities are used to complete the call. *See* 47 U.S.C. § 251(b)(5); Pet. App. 8a-9a.

The parties to this case agreed in their interconnection agreements to pay reciprocal compensation for the exchange of "Local traffic." Local traffic is defined in the parties'

interconnection agreements as a call of less than fifteen miles to another local telephone number. Pet. App. 18a; JA 8a, 14a, 38a. The dispute in this case was whether calls by local customers of one carrier that are routed by another carrier to its local customers operating as "Internet Service Providers" ("ISPs") constitute "Local traffic" under the interconnection agreements. These calls were treated for purposes of billing customers like any other local call. Pet. App. 18a-19a; JA 113a-114a, 117a. Ameritech and the Competitors also routinely charged each other reciprocal compensation for delivering ISP calls placed by each others' customers. JA 118a-119a.

In July 1997, however, Ameritech announced that it was unilaterally stopping reciprocal compensation payments for calls to local ISPs, claiming for the first time that such calls are not "Local Traffic." Pet. App. 9a. In response, the Competitors asked the ICC to enforce the agreements by requiring Ameritech to resume payments of reciprocal compensation for ISP calls. *Id.* at 9a-10a. The ICC held an evidentiary hearing on November 21, 1997. JA 98a-99a. On March 11, 1998, the ICC ruled that the plain language of the agreements, industry custom and practice, and Ameritech's own conduct mandated payment of reciprocal compensation for calls to ISPs. Pet. App. 10a; JA 112a-119a.[2/]

---

[2] The FCC has long struggled with whether the Act requires reciprocal compensation for calls to ISPs. It first held that the Act does not require, or prohibit, such payments. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689 (1999), *vacated, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000). At WorldCom's request, the D.C. Circuit vacated that order for want of reasoned decision making. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (continued...)

3. The District Court Proceedings

On March 27, 1998, Ameritech filed suit in the United States District Court for the Northern District of Illinois against the Competitors and the ICC Commissioners, in their official capacities, to challenge the ICC's determination.[3/] Ameritech sought declaratory and injunctive relief under 47 U.S.C. § 252(e)(6), 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201 and 2202. JA 126a-127a. Three of the five counts of Ameritech's complaint alleged continuing violations of federal law. JA at 139a-145a. Those counts alleged that the ICC's determination violates the express requirements of sections 251(b)(5), 252(d)(2) and 251(g) of the 1996 Act (Count IV); that the ICC's determination violates the 1996 Act in that the Act assigns regulatory authority over interstate communications such as calls to ISPs to the FCC (Count III); and that the ICC's determination is contrary to binding FCC regulations which purportedly characterized calls to ISPs as "exchange access"

---

[2] (...continued)
(D.C. Cir. 2000). The FCC recently has (1) concluded that the Act does not require reciprocal compensation for these calls, (2) established prospectively a new federal compensation regime for this traffic, and (3) determined that its new order does not affect preexisting contract obligations or state commission decisions like those at issue in this case. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. Apr. 27, 2001). Numerous parties have appealed that decision to the D.C. Circuit, *WorldCom, Inc v. FCC*, No. 01-1218.

[3] At the same time it filed in the District Court, Ameritech filed a parallel action in the Illinois Appellate Court. The Illinois Appellate Court stayed that action at Ameritech's request pending resolution of this case. *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, No. 3-98-0393, Order Granting Stay (Ill. App. Ct. June 17, 1998).

not subject to reciprocal compensation requirements (Count II). JA 140a-143a. Ameritech also claimed that the ICC's determination violates Illinois law (Count V), JA 144a-145a, and the terms of the interconnection agreements themselves (Count I), JA 139a-140a.

After briefing by the parties, the District Court rejected the ICC Commissioners' arguments that the court lacked jurisdiction and that the ICC Commissioners were immune from suit under the Eleventh Amendment. Pet. App. 26a-30a. The court also ruled against Ameritech on the merits, holding that the ICC's interpretation of the agreements did not violate federal law. JA 173a-180a.

4. The Seventh Circuit's Decision

Ameritech and the ICC Commissioners appealed to the Seventh Circuit. The Court of Appeals rejected the Commissioners' Eleventh Amendment arguments based on its prior decision in *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315 (7th Cir.) ("*MCI-I*") *amended*, 183 F.3d 558 (7th Cir. 1999), *modified on reh'g*, 222 F.3d 323 (7th Cir. 2000) ("*MCI-II*"), *cert. denied*, 121 S. Ct. 896 (2001). Pet. App. 1a-2a, 12a-13a. In *MCI-I*, which involved ICC determinations *approving* interconnection agreements, the Seventh Circuit had held that the Commissioners had waived any Eleventh Amendment immunity by voluntarily accepting Congress's invitation to participate in the implementation of interconnection agreements under the 1996 Act. 168 F.3d at 322. According to the court, "Congress gave states a genuine choice: The states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court; or the states could retain their sovereign immunity and allow the FCC to carry out

the federal regulatory functions without their participation." *Id.*

Having rejected the Eleventh Amendment arguments based on *MCI-I*, the Seventh Circuit in this case likewise rejected the Commissioners' contention that the court lacked subject matter jurisdiction over Ameritech's complaint because section 252(e)(6) of the Act did not provide for judicial review of commission determinations enforcing, as opposed to approving or rejecting, an interconnection agreement. Pet. App. 14a-15a ("Congress envisioned suits reviewing 'actions' by state commissions" for compliance with sections 251 and 252 of the Act).

But the Seventh Circuit also determined that a federal court's scope of review under section 252(e)(6) is limited. Because the plain text of section 252(e)(6) confines review to the question of compliance with sections 251 and 252, a court's task under section 252(e)(6) is "to examine the [state commission's] order, not to determine whether the [commission] correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation." *Id.* at 17a-18a. Thus, the Seventh Circuit explained, section 252(e)(6) provided no basis for the court to "review [the ICC's] actions for compliance with state law." *Id.* at 15a. Accordingly, the Seventh Circuit found that Ameritech's appeal presented a "narrow issue on the merits: whether a decision of the [ICC] regarding reciprocal compensation for telephone connections to [ISPs] violates federal law." *Id.* at 7a. Reviewing the Act and the relevant FCC orders, the Seventh Circuit concluded that "nothing in what the ICC said violates federal law in existence at this time." *Id.* at 22a.

Both Ameritech and the ICC Commissioners filed rehearing petitions. The ICC Commissioners raised essentially the same issues it raises here. Ameritech argued that the Seventh Circuit erroneously circumscribed federal court review, leaving Ameritech without a vehicle to challenge the state commission's contract analysis. In an initial response to Ameritech's petition, the Seventh Circuit amended its decision on August 19, 1999. It added language stating that "[s]ection 252(e)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. A decision 'interpreting' an agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Id.* at 4a-5a.

The rehearing petitions were then held in abeyance for approximately one year, pending the Seventh Circuit's reconsideration of its Eleventh Amendment ruling in *MCI-I*. During that year, *MCI-I*, on rehearing, was consolidated with new appeals from Wisconsin challenging state commission approval and enforcement determinations. The Seventh Circuit ultimately issued a revised opinion, *MCI-II*, which reaffirmed the court's ruling that state commissions do not have Eleventh Amendment immunity in actions brought under section 252. In that new opinion, the Seventh Circuit relied not only on waiver but also on *Ex parte Young*. It explained that suits against state commissioners challenging approval or enforcement of interconnection agreements as violative of federal law are "straightforward *Ex parte Young* cases." *MCI-II*, 222 F.3d at 345. This is so, according to the court, because such suits do no more than seek prospective injunctive and declaratory relief against state officials to prevent their continuing violation of federal law. *Id.* The court then distinguished cases under the 1996 Act from this Court's

decisions in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995), and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), on the ground that *Ex parte Young* actions under the 1996 Act do not improperly expand limited remedies made available by Congress and do not divest the States of any "special sovereignty interest" that might justify a federal court's refusal to enforce the 1996 Act. *MCI-II*, 222 F.3d at 345-48.

As for waiver, the *MCI-II* court held that "Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court." *Id.* at 341. The Seventh Circuit also distinguished this Court's recent decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), on the ground that the 1996 Act did not extract the type of "*Parden*-style" constructive waiver that this Court rejected in *College Savings*. To the contrary, the opportunity to participate in the administration of the 1996 Act was a "gratuity" from Congress that was clearly conditioned on a state commission's submission to suit in federal court. *MCI-II*, 222 F.3d at 342-44. Having freely accepted the benefit, the state commission must also accept the condition and submit to review of its determination under the 1996 Act in federal court. *Id.* at 344.

After the new *MCI-II* decision was handed down, the Seventh Circuit denied rehearing in this case on August 9, 2000. Pet. App. 2a. This Court denied review of *MCI-II* on January 22, 2001, prior to the ruling of the Fourth Circuit in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 297 (4th Cir. 2001), *cert. granted sub nom. Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 121 S. Ct. 2548 (2001), which

created the first conflict among the circuits over the questions presented here. It later granted review in the instant case soon after the Fourth Circuit ruling. Subsequently, the Court granted review of two petitions challenging the Fourth Circuit's ruling, limited to the single question of whether a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act. *See Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 121 S. Ct. 2548 (2001) ("*Verizon*").

SUMMARY OF THE ARGUMENT

The first question presented is whether a state commission action enforcing an interconnection agreement is "a determination under section 252" reviewable in federal court under section 252(e)(6). As the Fifth, Seventh, Eighth, and Tenth Circuits have agreed, the answer to that question is yes. The language and structure of section 252 indicate that Congress included section 252(e)(6) in order to make unequivocal that federal courts would play a role in reviewing the actions of state commissions that choose to participate in the new federal scheme. Section 252(e)(6) can and should be construed to accomplish that purpose with respect to all state commission "determinations," including enforcement decisions.

The Court should not assume, however, that section 252(e)(6) is the only source of federal jurisdiction to review enforcement actions for compliance with federal law. It is not. Even if section 252(e)(6) were inapplicable, general federal question jurisdiction would exist under 28 U.S.C. § 1331 to address claims that state officials have violated the 1996 Act in enforcement determinations. In this case,

Ameritech has raised a series of claims to the effect that federal law controls over state requirements. While the courts below found – correctly, in our view – that Ameritech's federal claims lacked merit, the courts nonetheless had the power to consider them under section 1331 as well as section 252(e)(6). The ICC Commissioners take too narrow a view of the federal courts' role to enforce the 1996 Act.

On the other hand, Ameritech takes too broad a view of federal jurisdiction. Nothing in the 1996 Act suggests that Congress intended to federalize the contract law question whether a state commission has correctly interpreted an interconnection agreement. The 1996 Act is replete with anti-preemption provisions and savings clauses expressly preserving state law. The question whether a state commission has correctly interpreted a contract thus arises under state law, as each circuit court to have expressly considered the question has agreed.

The Seventh Circuit's holding that the ICC Commissioners are not immune from suit here also should be affirmed for two independent reasons. First, consistent with the well-settled doctrine of *Ex parte Young*, 209 U.S. 123 (1908), the 1996 Act permits aggrieved parties to seek review of state commission determinations in federal court. Here, Ameritech brought suit in federal court for prospective injunctive and declaratory relief to stop the Commissioners' alleged ongoing violations of federal law – precisely the type of action that *Ex parte Young* permits. Moreover, that the alleged violations of federal law occurred in a formal decision issued by the ICC, and that judicial review would also have been available in state court, in no way undermine the applicability of *Ex parte Young*.

By its terms, the 1996 Act imposes no limits on the equitable powers that federal courts have at their disposal to ensure that state commissioners' actions comply with the Act's requirements. Thus, an *Ex parte Young* suit does not expand the remedy that Congress provided in the 1996 Act. To the contrary, the remedies available under each are perfectly coterminous. It follows that this Court's admonition in *Seminole Tribe* – that courts must not allow suits under *Ex parte Young* to eviscerate detailed and limited remedial schemes prescribed by Congress – has no application here.

Although the analysis can stop there, the Commission defendants also consented to federal court jurisdiction and thereby waived any Eleventh Amendment immunity by voluntarily choosing to participate in the administration of the 1996 Act. In the spirit of cooperative federalism, Congress offered states the benefit of participating in the administration of the Act. It lay solely within Congress's discretion whether to offer states that opportunity; administration of a new *federal* Act is not an otherwise permissible activity for a state. Further, each state is free to decline any role in administering the Act if it so chooses. Accordingly, the ICC Commissioner's participation in the administration of the Act is a benefit or "gratuity" that can be conditioned on waiver of Eleventh Amendment immunity under this Court's decision in *College Savings*.

ARGUMENT

I. FEDERAL COURTS HAVE JURISDICTION TO DETERMINE WHETHER STATE COMMISSION "ENFORCEMENT" DETERMINATIONS VIOLATE THE 1996 ACT.

The first question presented is "[w]hether a state commission's action relating to the enforcement of a previously approved section 252 interconnection agreement is a 'determination under [section 252]' and thus is reviewable in federal court under 47 U.S.C. § 252(e)(6)." The short answer to that question is yes. A state commission action enforcing an interconnection agreement is "a determination under section 252" and is reviewable in federal court under section 252(e)(6).

We respectfully submit, however, that the Court's inquiry should more properly begin with the general grant of federal question jurisdiction in 28 U.S.C. § 1331. The question, as we see it, should be whether anything in section 252 suffices to *withdraw* federal question jurisdiction as to this one category of federal claims. When the question is reformulated in this manner, the answer becomes very clear. There is no language in section 252(e)(6) – or any other portion of the 1996 Act – even hinting at a congressional intent to *bar* federal jurisdiction over claims that state commission enforcement determinations have violated the Act.

A. Ameritech Raised Federal Questions That Federal Courts Have Jurisdiction to Answer under 28 U.S.C. § 1331.

The ICC and its supporting *amici* proceed from the false assumption that the existence of federal jurisdiction to review claims that state officials violated federal law in enforcement decisions turns on whether those decisions are "determinations under section 252" within the meaning of section 252(e)(6). *See, e.g.*, Pet. Br. 17-18; Br. of New Jersey *et al.* as *Amici Curiae*, at 1-2 ("N.J. Br."); Br. of *Amicus Curiae* Nat'l Ass'n of Reg. Util. Comm'rs, *et al.*, at 9-17 ("NARUC Br."); Br. of Council of State Gov'ts, *et al.* as *Amici Curiae*, at 5-6 ("Council Br."). Regardless of how the Court rules on that issue, the district court plainly had jurisdiction to consider Ameritech's federal claims. A civil action "arises under" federal law for purposes of section 1331 when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997).

To determine whether it has federal question jurisdiction, the court "must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Bell v. Hood*, 327 U.S. 678, 681 (1946); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Ameritech's complaint easily satisfies this requirement. Three counts in that complaint – Counts II, III, and IV – directly allege a federal violation. In Count II, Ameritech alleged that "The ICC Order Is Contrary To Controlling FCC Orders." JA 140a. In Count III, Ameritech alleged that "The ICC's Order Violates Controlling

Federal Law, Which Assigns Authority Over Interstate Communications To The FCC." JA 141a. In Count IV, Ameritech alleged that "The ICC Order Violates Sections 251(b)(5), 252(d)(2) and 251(g) of the 1996 Act." JA 142a. Each of these Counts requires the court to consider federal law as an "essential element" of Ameritech's claims. Jurisdiction therefore exists under section 1331. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction [under section 1331] over suits to enjoin state officials from interfering with federal rights").

Of course, federal statutory challenges to state commission enforcement determinations as contrary to federal law need not be *meritorious* in order to fall within the jurisdiction of the federal courts. Here, for example, the district court and the Seventh Circuit properly concluded that nothing in the Act or relevant FCC regulations bars the ICC from enforcing agreements to pay reciprocal compensation on calls to ISPs. But "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. at 682; *accord Jackson Transit Auth. v. Local Div. 1285*, 457 U.S. 15, 21 n.6 (1982). The "absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (emphasis in original). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to

involve a federal controversy." *Id.* (internal quotations and citations omitted).[4]

In sum, the district court plainly had jurisdiction over this case under section 1331, unless section 252(e)(6) somehow withdraws that jurisdiction. As we show next, no such withdrawal has occurred.

B. Section 252(e)(6) Does Not Withdraw the District Court's General Federal Question Jurisdiction.

Section 252(e)(6) does not preclude a federal court from exercising general federal-question jurisdiction in cases challenging state commission enforcement actions. First, though clearly a grant of power to the federal courts, it is far from clear that section 252(e)(6) addresses what this Court has referred to as "genuine subject matter jurisdiction." *See Steel Co.*, 523 U.S. at 90-91 (even statutes referring to "jurisdiction" frequently do not relate to "genuine subject-matter jurisdiction"). It states:

---

[4] The Fourth Circuit failed to heed this critical distinction in the only court of appeals rulings finding a lack of federal jurisdiction over enforcement actions. *See Bell Atlantic Md., Inc.*, 240 F.3d at 297; *BellSouth Telecomms., Inc. v. North Carolina Utils. Comm'n*, 240 F.3d 270 (4th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3740 (U.S. May 14, 2001) (No. 00-1699). There, as here, the plaintiffs were incumbent carriers claiming that state commissions had violated federal law in orders requiring reciprocal compensation for calls to ISPs under interconnection agreements. Under the current state of federal law, the Fourth Circuit could not conceive how such a claim could have merit. *See, e.g, Bell Atlantic*, 240 F.3d at 295-97, 307-08. We agree with the Fourth Circuit that the claims had no merit, but the fact remains that the incumbents were raising non-frivolous claims requiring the court to construe federal law. We also address these issues in our brief filed contemporaneously in *Verizon*.

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of Section 251 and this section [252].

47 U.S.C. § 252(e)(6). The section does not mention "jurisdiction," and its language is just as consistent with the conclusion that Congress was simply confirming the existence of a cause of action to challenge state commission actions under the Act. *See Steel Co.*, 523 U.S. at 90-91.

Second, assuming that section 252(e)(6) does relate to the district court's subject matter jurisdiction, it cannot be construed as withdrawing preexisting jurisdiction in enforcement cases. The crux of the argument pressed by the ICC Commissioners and their supporting *amici* concerning the meaning of section 252(e)(6) is that it has *nothing whatsoever* to do with enforcement of interconnection agreements. Observing that section 252(e)(6) relates to State commission determinations "under" section 252, Petitioners argue that "[s]ection 252 sets out procedures only for the negotiation, arbitration and approval of agreements. . . . [T]hat section is *utterly silent* regarding how, or by whom, an agreement is to be interpreted and enforced once it has gone into effect." Pet. Br. 18 (emphasis added).[5]

---

[5] *See also id.* at 23 ("The Act's local telephone provisions contain no overt mention . . . of state commission authority to interpret and enforce contracts between local telephone carriers"); NARUC Br. 12-13 ("A close look at § 252 suggests that the caption of the section, which states only that it covers 'Procedures for negotiation, arbitration, and approval of agreements,' is true to the text. The only State 'determinations' authorized

(continued...)

We disagree with this interpretation of section 252(e)(6), because enforcement determinations by state commissions are made "under" section 252. *See infra* Section I.C. But assuming that our interpretation were wrong and the ICC Commissioners' were correct, then section 252(e)(6) would be – in Petitioners' own words – "utterly silent" concerning jurisdiction to review enforcement determinations. Thus, on Petitioners' own view of the case, section 252 could not affect section 1331 jurisdiction to review enforcement determinations.[6] *See, e.g.*, *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673-76 (1986) (statute that expressly provides for judicial review in one class of cases does not eliminate section 1331 jurisdiction in another class of cases as to which it is silent) (superseded by statute on other grounds, when Congress amended 42 U.S.C. § 1395ff(b) (1988)).[7]

---

[5] (...continued)
deal specifically with arbitration and approval of arbitrated agreements. State enforcement authority is not mentioned") (footnote omitted); N.J. Br. 5-6 ("There is no express provision in the Act providing for the state commissions to enforce or otherwise resolve disputes between the parties to a previously approved agreement").

[6] Similarly, if section 252(e)(6) relates to a cause of action rather than to subject matter jurisdiction, either it gives carriers a cause of action for review of state commission enforcement determinations, or it is altogether silent concerning enforcement. In the latter case, the section would not constitute a detailed remedial scheme for enforcement that could displace a private right of action under 42 U.S.C. § 1983 or the inherent equitable authority of the federal courts to issue injunctions to enforce federal rights.

[7] *See also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 16 (2000) (explaining that *Michigan Academy* held that "statute's total silence" about judicial review in one class of cases "meant that, although review was not available *under § 405(g)*, the silence did not (continued...)

Third, the Act itself makes clear that it cannot be construed to limit the general reach of section 1331 by implication. Section 601 provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal . . . law unless *expressly* so provided in such Act or amendments." Pub. L. No. 104-104, § 601(c)(1) (emphasis added), *reprinted at* 47 U.S.C. § 152 note. Congress knows how *expressly* to limit the reach of section 1331, having done so elsewhere in the U.S. Code. *See, e.g.*, 42 U.S.C. § 405(h) ("[n]o action . . . shall be brought under section 1331 . . . of Title 28 to recover on any claim arising under this subchapter"). Plainly, section 252(e)(6) does not expressly limit the preexisting jurisdiction of the federal courts under section 1331.[8]

---

[7] (...continued)
itself foreclose other forms of review, say review in a court action brought under § 1331") (emphasis added); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493-94 (1991) (holding that statute that expressly limits jurisdiction of federal courts with regard to specific type of case will not be construed as impairing section 1331's general grant of federal question jurisdiction with respect to closely related proceedings); *cf. Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105-06 (1868) (holding that repeal of "an additional grant of jurisdiction" does not "operate as a repeal of jurisdiction heretofore allowed"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (holding same).

[8] Relying on section 601(c)'s preservation of *state* law, the Fourth Circuit concluded that Congress intended to leave review of enforcement decisions to state courts and preclude federal jurisdiction. *See Bell Atlantic*, 240 F.3d at 300-01, 303, 306. But the Fourth Circuit's analysis inexplicably ignores the fact that section 601(c) preserves both *federal and state* law, unless expressly superseded by the Act. With respect to enforcement cases, the Act expressly supersedes neither federal court jurisdiction under section 1331 nor state court jurisdiction under applicable state law. Again, we also address these issues in our brief filed (continued...)

Fourth, when Congress intended the Act to limit some court's subject matter jurisdiction, it did so clearly and unambiguously. Thus, the Act expressly provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4). Given that example of an express exclusion of jurisdiction elsewhere in the same section of the Act, the only fair conclusion is that in *enforcement* cases Congress was content to allow litigants the choice between state and federal court for pursuit of their federal claims.

C. A State Commission Enforcement Decision Is a "Determination" under Section 252.

In addition to section 1331, section 252(e)(6), assuming it speaks to jurisdiction, provides a second basis for jurisdiction here. The Fifth, Eighth, and Tenth Circuits have all agreed with the Seventh Circuit that the "determinations" reviewable under section 252(e)(6) include actions enforcing existing interconnection agreements. *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla. Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 480-81 (5th Cir. 2000). As the Tenth Circuit persuasively explained, "[s]ection 252(e)(6) grants federal jurisdiction in *'any case'* in which a state commission makes a 'determination' under this section. When a state commission, after approving an agreement pursuant to the authority granted by the Act, subsequently issues another decision interpreting the terms of the agreement, this is also a

[1] (...continued)
contemporaneously in *Verizon*.

'determination' pursuant to its authority under § 252." *Brooks Fiber*, 235 F.3d at 497 (emphasis added). The only dissenting circuit is the Fourth, which misconstrued the statute for the reasons stated herein and in WorldCom's brief in *Verizon*.

The ICC Commissioners and their supporting *amici* focus on two aspects of the language of section 252(e)(6). First, they argue that the ICC's action was not "under" section 252 because that section assertedly deals only with approval or rejection, not enforcement, of interconnection agreements. *See e.g.*, Pet. Br. 16-20. But the ICC already has admitted that its determination was made "under" section 252. Its own Order stated: "[t]his Commission's jurisdiction under [state law] and Section 252 of the Telecommunications Act of 1996 . . . to interpret and enforce the terms of interconnection agreements is not disputed." JA 112a. Indeed, the ICC cited the Eighth Circuit's pronouncement that

> the state commissions' plenary authority [under sections 251 and 252] to accept or reject [interconnection] agreements necessarily carries with it authority to enforce the provisions of the agreements that the state commissions have approved.

Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (1997), *vacated in relevant part as unripe sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999) (cited by ICC Order, JA 112a, 121a).

This understanding of the scope of section 252 is undoubtedly correct in light of Congress' other uses of the phrase "under this section" in section 252. Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission *in approving or rejecting an*

agreement under this section." 47 U.S.C. § 252(e)(4) (emphasis added). If state commission action "under this section [252]" encompassed nothing more than approving or rejecting an agreement – as the ICC Commissioners contend – then Congress' insertion of the words "approving or rejecting an agreement" before "under this section" would be entirely redundant in section 252(e)(4). In that event, Congress simply could have said "[n]o State court shall have jurisdiction to review the action of a State commission [ ] under this section." But it did not. Congress' deliberate inclusion of the limiting phrase "approving or rejecting an agreement" in section 252(e)(4), and its deliberate omission of those words in section 252(e)(6), can only be understood as a recognition that section 252(e)(6) refers to matters going beyond approval and rejection decisions.

Similarly, section 252(e)(5) provides that "[i]f a State commission fails to act or carry out its responsibility *under this section* in any proceeding or other matter *under this section* . . . the [FCC] . . . shall assume the responsibility of the State commission *under this section* with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5) (emphasis added). If state commission responsibilities "under this section [252]" did not include both approval *and* enforcement actions, there would be no authorization for the FCC to step in and resolve disputes over enforcement of interconnection agreements in the event a state commission chose not to do so.

The FCC has interpreted section 252(e)(5) to encompass enforcement determinations in a case in which the Virginia Corporation Commission chose not to interpret and enforce a previously approved interconnection agreement. *See In re Starpower Communications, LLC, Petition for Preemption of*

Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, 15 F.C.C.R. 11277, ¶¶ 1-6 (2000) ("*Starpower*"). The FCC reasoned:

> In applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' "responsibility" *under section 252.* We conclude that *it is*.

Id.¶ 6 (emphasis added). The FCC expressly incorporated the Seventh and Fifth Circuit's reasoning on this point, finding that "inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements under section 252 is the authority to interpret and enforce previously approved agreements." *Id.* ¶6 & n.13 (citing *Illinois Bell*, 179 F.3d 566, and *Southwestern Bell*, 208 F.3d 475). Congress expressly delegated to the FCC authority to make rules with the force of law implementing all provisions of the 1996 Act, *see* 47 U.S.C. § 201(b); *AT&T Corp.*, 525 U.S. at 377-85, and the FCC's interpretation of the Act is therefore entitled to *Chevron* deference from this Court, *United States v. Mead Corp.*, 121 S. Ct. 2164, 2172-73 (2001).[9]

---

[9] In interpreting section 252(e)(6) to apply only to state commission approval decisions, the Fourth Circuit recognized that its holding could conflict with the FCC's ruling in *Starpower* but suggested that a state commission's "responsibility under this section" in section 252(e)(5) may be different than a state commission "determination under this section" in section 252(e)(6). *See Bell Atlantic*, 240 F.3d at 303 n.6. There is no basis for refusing to defer to the FCC's conclusion that the phrase "under this section" should have the same meaning in both subsections.

In sum, there is ample basis in the language of the statute to conclude that Congress understood enforcement determinations to be "under" section 252. Any other reading would mean that in the event a state commission chose not to handle an enforcement dispute, the matter might have to be resolved in the first instance, not by the FCC under section 252(e)(5), but by a court, which is unlikely to be what Congress had in mind.[10/]

Petitioners also rely on the language in section 252(e)(6) providing that federal courts should determine whether the "agreement . . . meets the requirements of section 251 [and section 252]." Petitioners argue that review of *agreements* occurs at the time of approval, not enforcement. Pet. Br. 19. But the fact that the statute refers to review of agreements for compliance with the Act does not exclude treatment of enforcement actions as "determinations" reviewable under section 252(e)(6). Rather, this language simply reflects the nature of the legal issues presented when state commission enforcement actions are challenged as violating the Act. For example, in the course of enforcing an arbitrated agreement, a state commission could adopt an interpretation of the agreement that a party thinks is inconsistent with the Act. Or the commission might *refuse* to enforce a negotiated agreement based on a perceived inconsistency with the Act. As in these examples, any enforcement determination that allegedly violates the Act necessarily raises the question whether the

[10] Petitioners seek to support a contrary conclusion by citing *Ardestani v. INS*, 502 U.S. 129, 132-39 (1991), which dealt with a provision limiting application of the Equal Access to Justice Act to cases brought "under" section 554 of the Administrative Procedure Act. In that case, however, the deportation proceedings at issue had been *expressly* excluded from the scope of section 554 and the petitioner was asking the Court to overlook that express exclusion. Nothing of the sort applies to this case.

interconnection "agreement" itself – as negotiated by the parties and/or arbitrated, interpreted, and enforced by the state commission – "meets the requirements of" the Act.

The ICC Commissioners also argue that jurisdictional statutes must be "strictly construed." Pet. Br. 17; *see also* NARUC Br. 12 & n.15. The cases they cite do not state a rule of construction, however, much less one that would require every arguably ambiguous statute to be construed against jurisdiction. Rather, the cases stand for the proposition that the federal courts may not expand their jurisdiction beyond what Congress has provided by statute. Once Congress's intent has been determined *using ordinary means of statutory construction*, the jurisdiction created by Congress under the statute as construed "is not to be expanded by judicial decree," *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994).[11/] Thus, like any other statute, a jurisdictional statute must be construed to make sense and to comport with the structure and purpose of the statute as a whole. *See, e.g.*, *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275-76 (1996).

Accepting a construction of section 252(e)(6) that precludes federal court jurisdiction to review enforcement decisions "would yield an incoherent jurisdictional scheme," and the Court should "hesitate to attribute such a design to Congress." *Id.* The 1996 Act creates a "new federal regime"

[11] The decision on which Petitioners place primary reliance, *Stone v. INS*, 514 U.S. 386 (1995), is a case in point. There the Court employed ordinary rules of statutory construction to interpret a jurisdictional statute whose meaning was not clear on its face. *Id.* at 390-405. Having construed the statute, the Court held that it must adhere to the jurisdictional limits set by Congress and could not expand federal court jurisdiction through judge-made doctrines like "equitable tolling." *Id.* at 405.

that "fundamentally restructures local telephone markets." *AT&T Corp.*, 525 U.S. at 371, 378 n.6. Federal court review of state commission decisions ensures that federal courts can develop a uniform federal interpretation of the Act's substantive provisions. As this Court has emphasized in discussing the Act: "[I]f the federal courts believe a state commission is not regulating in accordance with federal policy *they may bring it to heel*." *Id.* at 378 n.6 (emphasis added).

It would have made no sense for Congress to have provided that federal courts have *exclusive* jurisdiction to review state commission orders approving interconnection agreements, *see* 47 U.S.C. § 252(e)(4) (ousting state court jurisdiction in approval cases), while simultaneously precluding federal courts from entertaining challenges to enforcement determinations as violative of the Act. That would mean that the power of the federal courts to resolve a given issue of federal law would turn entirely on whether a party happened to have the foresight and desire to raise it at the approval stage. Congress cannot have intended to set up a scheme of judicial review so dependent on arbitrary timing.

In sum, although section 252(e)(6) is not needed to establish federal jurisdiction over claims that state commission enforcement decisions violate the Act, the best reading of the statute authorizes, rather than excludes, federal court review in enforcement cases.

D. The 1996 Act Does Not Support Ameritech's View of the Complete "Federalization" of Interconnection Agreement Disputes.

For all the foregoing reasons, federal courts have jurisdiction – whether under section 252(e)(6) or section 1331

– to hear non-frivolous claims that state officials have violated the Act. Under either section, however, that jurisdiction extends only to questions arising under federal, not state, law.[12] Recognizing that limitation, Ameritech has sought to "federalize" every aspect of state commission enforcement determinations, including the question whether the commission correctly *interpreted* an agreement. Indeed, Ameritech filed a separate petition for certiorari seeking review of this question. *Illinois Bell Tel. Co. v. WorldCom Techs., Inc., petition for cert. filed*, 69 U.S.L.W. 3410 (U.S. Nov. 28, 2000) (No. 00-921).

The Court need not address this issue in order to answer the questions on which it granted review. Moreover, every circuit that has addressed the issue agrees that whether a state commission has incorrectly interpreted an interconnection agreement is a state law question. *Bell Atlantic Md., Inc.*, 240 F.3d at 308; *Brooks Fiber*, 235 F.3d at 497-99; *Southwestern Bell*, 208 F.3d at 480. Nonetheless, we will briefly address Ameritech's view, in anticipation that Ameritech will suggest that the issue is intertwined with the questions presented.

Contrary to Ameritech's view, questions of contract interpretation are not federalized merely because Congress required the contract by statute. *Jackson Transit*, 457 U.S. at 22-23. In *Jackson*, a union argued, much as Ameritech does

---

[12] Moreover, the Eleventh Amendment prevents a district court from asserting supplemental jurisdiction over state law claims under 47 U.S.C. § 1367 in suits against a state commission or its members in their official capacity unless the state consents to suit, because the doctrine of *Ex parte Young* does not apply to state law claims, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 103-21 (1984), and nothing in the Act indicates that Congress conditioned state participation on waiver of immunity with respect to state law claims.

here, that collective bargaining agreements were governed by federal law because a federal statute required local governments to execute those agreements. *Id.* at 20-21. This Court disagreed, holding that the interpretation of contractual terms raises a question of federal law only if the statute at issue demonstrates that Congress intended that "the rights and duties contained in [such a] contract be federal in nature." *Id.* at 23.

Ameritech nonetheless suggests that federal courts should fashion a federal common law of interconnection agreement interpretation. But federal courts may not create federal common law except in the most "narrow areas." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Only in a "few and restricted" cases, "where there is a significant conflict between some federal policy or interest and the use of state law" should a court contemplate creating federal common law. *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 87 (1994) (internal quotations and citations omitted). Instead, when dealing with a comprehensive federal statutory scheme, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85.

Nothing in the Act suggests that Congress intended to transform every contract interpretation issue arising from an interconnection agreement into a federal claim, particularly because many interconnection agreement provisions have nothing to do with the Act's requirements. In fact, section 252(a)(1) provides that parties may "enter into a binding agreement . . . *without regard* to the standards set forth in" the Act. 47 U.S.C. § 252(a)(1). Had Congress intended negotiated agreements – such as each of the agreements at issue here – to be governed exclusively by federal law, it would not

have allowed parties to enter into them "without regard" to the Act's requirements.[13]

Further, Congress provided that "[t]his Act . . . shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." Pub. L. No. 104-104, § 601(c), *reprinted at* 47 U.S.C. § 152 note. It also provided that states may impose state law requirements in interconnection agreements and that pro-competitive state law requirements that do not conflict with the Act are not preempted. 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c); *see also* Conf. Rep. 104-458, at 126-27 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 137. These provisions foreclose an argument that interconnection agreements are wholly federalized and should be interpreted according to federal common law principles.[14]

Finally, Ameritech has argued that the Seventh Circuit's position on the scope of federal jurisdiction means that parties

---

[13] Nor may Ameritech claim that enforcement actions are inherently federalized because it has a "right" under section 252(a) to a "binding" interconnection agreement. Merely because parties disagree about the meaning of a provision does not mean the agreement is not binding. Congress's statement in section 252(a) that interconnection agreements are "binding" simply means that parties are bound to perform under their agreement, as interpreted by a court or agency, and are not free to disavow or repudiate their obligations. In a case like this, no party has disavowed its interconnection agreement obligations; rather, the parties have a disagreement over what those obligations are.

[14] On this point, the ICC Commissioners are largely correct that states retain an important role in regulating local telecommunications. *See* Pet. Br. 21-27; 47 U.S.C. §§ 252(e)(3), 253(b). The ICC Commissioners simply push their argument too far in asserting that federal courts may play no role in vindicating federal rights in enforcement actions.

may have to file state claims in state court and federal claims in federal court. But that need occur only in cases where the defendant state commission chooses to assert Eleventh Amendment immunity to bar the federal court from considering state-law claims that would fall within the court's supplemental jurisdiction under 28 U.S.C. § 1367. *See Brooks Fiber*, 235 F.3d at 498. Where that occurs, the bifurcation is the result of the state's choice to invoke the Eleventh Amendment – not some flaw in the statutory scheme. As this Court recognized in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), bifurcated review of federal and state issues may be inefficient, but it is sometimes a necessary consequence of the Eleventh Amendment. 465 U.S. at 121-23.

E. The Court Should Not Misinterpret the Statute to Avoid a Purported Constitutional Issue That Is Neither Serious Nor Difficult.

There is no merit to Petitioners' argument that the Act should be interpreted to preclude federal court jurisdiction to adjudicate federal questions in order to avoid a serious constitutional question under the Eleventh Amendment. As we show in the next section, there is no grave threat of constitutional infirmity here, because this is a straightforward *Ex parte Young* case. Even if the analysis under *Ex parte Young* were less clear, due respect for Congress would preclude use of the doctrine of constitutional doubt to create jurisdictional "statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that . . . will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional." *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998). There is no possibility – much less a serious likelihood – that statutes permitting federal courts to

entertain suits for prospective relief against ongoing violations of federal law by state officials could be held unconstitutional.[15]

II. *EX PARTE YOUNG* PERMITS THIS SUIT.

This Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the rule of *Ex parte Young*, a doctrine meant to ensure the supremacy of federal law, *see Green v. Mansour*, 474 U.S. 64, 68 (1985), a suit in federal court against state officials seeking prospective relief from ongoing violations of federal law is not treated as implicating a state's immunity under the Eleventh Amendment. *See Coeur d'Alene*, 521 U.S. at 281 (opinion of the Court); *id.* at 294 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting); *see also Pennhurst*, 465 U.S. at 102 (citing *Ex parte Young*, 209 U.S. at 160).

Although the ICC Commissioners argue otherwise, Pet Br. 40-48, these requirements are plainly satisfied here. Significantly, neither the Commissioners nor their supporting *amici* contest that Ameritech's complaint sought only prospective relief. JA 125a-145a. They similarly do not deny

---

[15] The doctrine of constitutional doubt cannot be applied here for an additional reason: "the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled." *Almendarez-Torres*, 523 U.S. at 238; *see also, e.g., Salinas v. United States*, 522 U.S. 52, 59-60 (1997); *Seminole Tribe*, 517 U.S. at 57 n.9. Even assuming that, after the complexities of section 252(e)(6) have been unraveled, the Act could fairly be read as utterly inapplicable to enforcement cases, there would still be no possible interpretation of section 252(e)(6) that would actually withdraw the federal question jurisdiction conferred by section 1331.

that the effects of the Commissioners' determination is ongoing. *See MCI-II*, 222 F.3d at 345 (the "challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. . . . Such relief is precisely the type contemplated by the *Ex parte Young* doctrine"). Nor do Petitioners or their supporting *amici* contest the fact that Ameritech's complaint alleged ongoing violations of *federal* law.[16] JA 140a-143a.

---

[16] Only the Fourth Circuit has reasoned that the elements of an *Ex parte Young* action are not met in the enforcement context because a carrier's complaint does not arise under federal law but, rather, arises under the interconnection agreement itself and, therefore, under state contract law. *See Bell Atlantic Maryland, Inc.*, 240 F.3d 279; *BellSouth Telecomms.*, 240 F.3d 270. That reasoning is flawed and no party adopts it here. In that case, the Fourth Circuit acknowledged that Bell Atlantic's complaint alleged that the state commission's determinations violated both federal and state law. It concluded that Bell Atlantic's federal claims lacked merit, however, and that its only potentially meritorious claims were its state contract law claims based on the terms of the interconnection agreement. *Bell Atlantic*, 240 F.3d at 295-97. Accordingly, the court held that Bell Atlantic's complaint could not be maintained under *Ex parte Young* because it did not arise under federal law and, therefore, the state interest outweighed any federal interest in the matter. *Id.* at 297-98. But the rule of *Ex parte Young* does not require that the allegations arising under federal law be meritorious. If it did, courts would be required to pre-judge and rule on the merits of the plaintiff's federal causes of action before determining whether the court had jurisdiction to do so. Instead, this Court has made clear that *Ex parte Young* requires only that the plaintiff *allege* a non-frivolous violation of federal law. *See Coeur d'Alene*, 521 U.S. at 281 ("An *allegation* of an ongoing violation of federal law . . . is ordinarily sufficient") (emphasis added); *Papasan v. Allain*, 478 U.S. 265, 281-83 (1986) (first determining whether plaintiff *alleged* ongoing violations of federal law, and *then* addressing whether those allegations warranted relief on their merits); *see also Bell Atlantic*, 240 F.3d at 317 n.9 (King, J., dissenting).

Instead, Petitioners argue that they cannot be accused of having *violated* federal law by having erroneously *applied* it. Pet. Br. at 42-45. That argument has no basis in this Court's *Ex parte Young* jurisprudence. Petitioners rely primarily on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), for the proposition that government officials do not lose sovereign immunity where they have been given the authority to apply the law but have done so incorrectly. In *Larson*, a private corporation brought suit in federal court against a *federal* official – the Administrator of the federal War Assets Administration – alleging that the official had breached the Administration's contract with the corporation by failing to make a delivery thereunder. *Id.* at 685-86. The Court ruled that the federal official's erroneous interpretation of federal common law was not sufficient to strip him of sovereign immunity. *Id.* However, the Court expressly distinguished the case before it from cases such as *Ex parte Young* where a *state* official is alleged to have violated federal law and, therefore, is deemed to be acting under an unconstitutional grant of power. *Id.* at 690-91 (citing *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (citing *Ex parte Young*)).

Larson has no applicability here, where *state* officials are alleged to be violating *federal* law. Indeed, the ICC Defendants' reliance on *Larson* ignores the fundamental Supremacy Clause concerns that underlie *Ex parte Young*. *See Green*, 474 U.S. at 68 ("*Ex parte Young* gives life to the Supremacy Clause" and is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law"). The power of federal courts to enforce the Supremacy Clause under *Ex parte Young* does not turn on whether state officials purport to be acting *pursuant to* state rather than federal law, but on the fact that they are *state* rather than federal *officials* and their actions are *contrary to federal law*. As the Court explained in

Pennhurst, "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold *state officials* responsible to 'the supreme authority of the United States.'" 465 U.S. at 105 (emphasis added) (quoting *Ex parte Young*, 209 U.S. at 160). *See also New York v. United States*, 505 U.S. 144, 179 (1992) ("the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply").

The dual sovereignty that characterizes our constitutional order draws a fundamental distinction between state and federal officials. *See, e.g., Printz v. United States*, 521 U.S. 898, 918-22 (1997). Federal executive officials are subject to the ultimate control of the President, who heads one of the co-equal branches of the federal government and is accountable to the Nation. *See id.* at 922-23. If Congress believes that control by the President is insufficient to ensure that federal officials comply with federal law, Congress can waive sovereign immunity to permit federal court review of the lawfulness of executive action, as it has done in the Administrative Procedure Act. *See* 5 U.S.C. § 702. Thus, the Supremacy Clause concerns that underlie *Ex parte Young* are altogether absent in such a *Larson*-type situation.[17]

[17] Similarly, Supremacy Clause concerns are absent in the situation addressed by *Pennhurst*, which the ICC Defendants also cite for the proposition that *Ex parte Young* does not apply when government officials are acting within the scope of their authority. *Pennhurst* addressed the availability of "injunctive relief against state officials on the basis of *state* law." 465 U.S. at 91 (emphasis added). Not surprisingly, the Court held that "[i]n such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials (continued...)

In contrast, State officials are accountable to the people of their respective states, not the federal executive. *See Printz*, 521 U.S. at 920 ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens"). Further, except in narrow circumstances, Congress cannot abrogate the Eleventh Amendment immunity of the states to ensure that state officials comply with federal law. *See Seminole Tribe*, 517 U.S. at 55-73. Nor can Congress subject an unwilling State to suit in its own courts. *Alden*, 527 U.S. at 730-54. That leaves states free to shield their officials from judicial enforcement of federal law – *unless Ex parte Young applies*. It is for that very reason that the Court in *Alden* stressed that *Ex parte Young* is an "essential . . . part of our sovereign immunity doctrine." *Id.* at 748.

The need for *Ex parte Young* to vindicate the Supremacy Clause is not diminished where, as here, state officials take action pursuant to a federal law that they are authorized to carry out, but do so in a way that violates that federal law. When they are administering federal law, state officials remain the agents of an independent sovereign outside the direct control of the federal executive and federal courts, except insofar as *Ex parte Young* applies. The Supremacy Clause is not concerned with the legal source of a state officials' power to make policy decisions – such as those governing interconnection agreements – but "turns on the actual content of [the state official's] policy and its real effect on federal rights." *Livadas v. Bradshaw*, 512

[17] (...continued)
on the basis of state law, whether prospective or retroactive, *does not vindicate the supreme authority of federal law*." *Id.* at 106 (emphasis added); *see also Papasan*, 478 U.S. at 277 (1986) ("In such a case, federal supremacy is not implicated because the state official is acting contrary to state law only").

U.S. 107, 119 (1994).[18] Thus, in *Edelman v. Jordan*, this Court applied *Ex parte Young* to the policies pursued by state officials under a "federal-state program" which – like arbitration and approval of interconnection agreements under the 1996 Act – was largely administered by state officials within parameters set by federal law. *See* 415 U.S. 651, 653-54, 671-73 (1974); *see also Quern v. Jordan*, 440 U.S. 332, 346-49 (1979) (affirming prospective relief in sequel case to *Edelman*).

In sum, the fact that the ICC Commissioners were alleged to have violated federal law in the course of administering a federal regulatory program does not undermine the applicability of *Ex parte Young*. To the contrary, this is a "straightforward *Ex parte Young* case." *MCI-II*, 222 F.3d at 345.[19]

Petitioners next rely on *Seminole Tribe*, where the Court held that the inclusion in a statute of an express and very limited set of judicial remedies against the state impliedly precluded reliance on *Ex parte Young*. Pet. Br. 45-48 (citing *Seminole Tribe*, 517 U.S. at 74). But there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the

---

[18] *Livadas* addressed the question whether a policy pursued by a state official was preempted by the National Labor Relations Act. The Supremacy Clause is, of course, the foundation for such preemption claims.

[19] *AT&T Communications v. BellSouth Telecomms., Inc.*, 238 F.3d 636, 647 (5th Cir. 2001) (same); *MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939 (10th Cir. 2000) (same), *cert. denied*, 121 S. Ct. 1167 (2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.) (same), *cert. denied*, 531 U.S. 816 (2000).

requirements of section[s] 251" and 252. 47 U.S.C. § 252(e)(6). That is precisely what *Ex parte Young* permits: a "suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14 (describing contours of *Ex parte Young*). Section 252(e)(6) of the Act thus raises none of the concerns present in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court held that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part.[20] *Id.* at 75. For example,

---

[20] This Court described the intricacies and limited nature of the judicial review provisions under the IGRA, as follows:

> A tribe that brings an action under § 2710(d)(7)(A)(i) must show that no Tribal-State compact has been entered and that the State failed to respond in good faith to the tribe's request to negotiate; at that point, the burden then shifts to the State to prove that it did in fact negotiate in good faith. § 2710(d)(7)(B)(ii). If the district court concludes that the State has failed to negotiate in good faith toward the formation of a Tribal-State compact, then it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If no compact has been concluded 60 days after the court's order, then "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7)(B)(iv). The mediator chooses from between the two proposed compacts the one "which best comports with the terms of [the Act] and any other applicable Federal law and with the findings and order of the court," *ibid.*, and submits it to the State and the Indian tribe, § 2710(d)(7)(B)(v). If the State

(continued...)

although the IGRA authorized federal courts to order a state to negotiate in good faith, it barred enforcement of those orders. *Id.* at 74-75. Thus, the Court in *Seminole Tribe* saw a clear *inconsistency* between the limited remedies available against the state under the IGRA and an *Ex parte Young* action, where the typical remedy is an enforceable injunction.

Nothing in section 252 limits federal court review in a remotely comparable manner. In fact, allowing *Ex parte Young* suits to proceed pursuant to section 252(e)(6) furthers Congress's intent to allow federal courts to address ongoing violations of federal law by state officials. Unlike the IGRA, for example, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).[21]

---

[20] (...continued)
consents to the proposed compact within 60 days of its submission by the mediator, then the proposed compact is "treated as a Tribal-State compact entered into under paragraph (3)." § 2710(d)(7)(B)(vi). If, however, the State does not consent within that 60-day period, then the Act provides that the mediator "shall notify the Secretary [of the Interior]" and that the Secretary "shall prescribe . . . procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction. § 2710(d)(7)(B)(vii).
517 U.S. at 50.

[21] Amici NARUC, *et al.*, attempt to liken the IGRA's detailed and limited judicial review provisions to the 1996 Act by comparing the IGRA's *judicial review* provisions with the 1996 Act's procedures for *arbitrating interconnection agreements* before state commissions. NARUC Br. 22-23. That is an apples-to-oranges comparison. The only relevant comparison is between the IGRA's judicial review scheme and the 1996 Act's judicial
(continued...)

Seminole Tribe also held that the IGRA specifically requires that "the State" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the State" for purposes of carrying out the State's duties under the IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, nothing in the Act requires that actions be brought against "the State." Petitioners' argument to the contrary is simply incorrect. *See* Pet. Br. at 46-48; *see also* Br. of NARUC at 23-24. Section 252 does not specify who must be a party in federal court, but simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended such suits to be brought on that basis. *See Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 230-31 (1908) ("a bill against the commission to restrain the members from enforcing [an order] will not be bad . . . as a suit against a State, and will be the proper form of remedy") (citing *Ex parte Young* among other cases); *cf.* 5 U.S.C. § 702 (waiving immunity from injunctive relief against federal agencies *and officials of federal agencies* in suits seeking review of agency action). Moreover, the term "state commission" is expressly defined in the Act to

---

[21] (...continued)
review provision, section 252(e)(6), which provides for review of state commission actions for compliance with federal law without limitation as to remedy.

include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. 47 U.S.C. § 153(41). Contrary to the claims of Petitioners and their supporting *amici*, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.[22] The Act's authorization of suits against state commissions thus applies with equal force to suits against state commissioners, whether directly under section 252(e)(6) or under 28 U.S.C. § 1983. Accordingly, an *Ex parte Young* action against state commissioners in their official capacities would not "'supplement' the scheme created by Congress." Pet. Br. 48. To the contrary, it would effectuate it. *See Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring) (explaining that fact that suit names numerous public officials does not remove it from the scope of permissible *Ex parte Young* actions).[23]

---

[22] *Seminole Tribe's* limitation on *Ex parte Young* suits applies only where Congress has enacted a limited remedial scheme for the enforcement of statutory rights "against a State." *Seminole Tribe*, 517 U.S. at 74. If this Court were to find that the 1996 Act does not expressly provide a remedy *against a State*, then, by its own terms, *Seminole Tribe's* limitation on the remedies available in an *Ex parte Young* action would not apply.

[23] Petitioners cite the Fourth Circuit's assertion that, absent a text-based evidence that Congress intended to authorize suits against individual state commissioners, such suits "would be an affront to the sovereignty of the State . . . and would undermine the mutual respect that characterizes the relationship between the federal and State sovereigns." Pet. Br. 47-48 (quoting *Bell Atlantic Maryland*, 240 F.3d at 279). But the Act expressly authorizes federal review of state commission determinations and defines "State commission" to include the individual state commissioners thereof. *See* 47 U.S.C. § 153(41). Moreover, the Fourth Circuit adopted a balancing approach to *Ex parte Young* that this Court has expressly rejected. *Compare* (continued...)

In addition to Petitioners' arguments, their supporting *amici* raise a litany of meritless arguments. NARUC, for example, mistakenly relies on *Coeur d'Alene* for the proposition that Ameritech's suit against the Commissioners would unlawfully encroach on core matters of state sovereignty. NARUC Br. 24-25. In *Coeur d'Alene*, which was expressly limited to its facts, 521 U.S. at 287, this Court held that the *Ex parte Young* suit brought there could not proceed because it was in essence a quiet title action that would "bar the State's principal officers from exercising their governmental authority over the disputed lands and waters" and "would diminish, even extinguish, the State's control over a vast reach of lands and waters." 521 U.S. at 282. This suit, by contrast, is to enforce the statutory mandates of the 1996 Act, by which (as to matters covered by the Act such as interconnection agreements among competitors) Congress "unquestionably" "has taken regulation of local competition away from the States." *AT&T Corp.*, 525 U.S. at 378 n.6. Moreover, what Congress took away from the states in the 1996 Act – regulatory authority over a small slice of intrastate telecommunications – is not an inviolable core of state sovereignty like the authority over a state's lands and waters but, rather, was ceded to the states by Congress in the Communications Act of 1934. *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). This case does not remotely implicate the unique sovereignty interests at issue in *Coeur d'Alene*.

---

[23] (...continued)
240 F.3d at 295-96 *with Coeur d'Alene*, 521 U.S. at 295-96 (O'Connor, J., concurring), *and id.* at 298-99 (Souter, J., dissenting). And it applied that balancing test by anticipating the merits of the case, rather than just examining the allegations of the complaint as the doctrine requires. *See Coeur d'Alene*, 521 U.S. at 294-96 (O'Connor, J., concurring); *id.* at 312-13 (Souter, J., dissenting).

Several *amici* also argue that resort to *Ex parte Young* should not be permitted here because it is not "necessary" in that the parties' could have challenged the ICC's decision in state court. N.J. Br. 29; Council Br. 28; Br. of *Amicus Curiae* Pa. Pub. Utils. Comm'n 14-16 ("Pa. PUC Br.").[24] That argument was flatly rejected by a majority of this Court in *Coeur d'Alene*. *See* 521 U.S. at 291-93 (O'Connor, J., concurring); *id.* at 312-17 (Souter, J., dissenting). The availability of relief under *Ex parte Young* in no way depends on the absence of available state remedies.[25]

---

[24] Similarly, a number of *amici* contend that resort to *Ex parte Young* is inappropriate because this case is "an ordinary administrative appeal" from a state agency and thus belongs in state court. N.J. Br. 27; Council Br. 21; Pa. PUC Br. 4. But *Ex parte Young* is the traditional mechanism for federal court review of *any* state commission order that violates federal law, ordinary or not. *See Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (rejecting challenge by state public service commissioners to federal judicial review of commission orders "in view of the many cases prior to and following *Ex parte Young* . . . in which this Court has granted such relief over the same objection"); *Prentis*, 211 U.S. at 230-31. Moreover, this is far from an ordinary state administrative appeal. With the 1996 Act, Congress radically altered the balance of state authority over the local telecommunications industry by imposing uniform national standards and policies, H.R. Conf. Rep. No. 104-458, at 1 (1996), and by vesting the federal courts with jurisdiction over state commission determinations. *See AT&T Corp.*, 525 U.S. at 378 n.6. The latter action clearly was viewed as necessary to assure a consistent implementation of this important new federal statutory scheme.

[25] Finally, the Council of State Governments and other *amici* contend that the injunctive relief sought by Ameritech is barred by the Anti-Injunction Act and *Younger* abstention. Council Br. 19-28. But the Anti-Injunction Act does not apply to lawsuits authorized by Congress. 28 U.S.C. § 2283. Here, resort to federal court is expressly authorized by § 252(e)(6) and 42 U.S.C. § 1983. More fundamentally, the Anti-Injunction (continued...)

In sum, there is no reason to doubt that *Ex parte Young* is fully applicable here.

III. THE ICC WAIVED ANY ELEVENTH AMENDMENT IMMUNITY BY ACCEPTING THE BENEFIT OF ADMINISTERING THE ACT.

Although the Court need not reach the question, the Eleventh Amendment also would not bar the instant proceedings because the ICC waived any Eleventh Amendment immunity by voluntarily assuming a role in administering the 1996 Act – an opportunity that Congress conditioned upon subsequent federal court review. Contrary to the arguments of Petitioners and their supporting *amici*, this Court's recent decision in *College Savings* does not foreclose the possibility that a state may waive its Eleventh Amendment immunity without an express statement to that effect. Indeed, *College Savings* stands for just the opposite proposition. Moreover, the

---

[25] (...continued)
Act prohibits only injunctions to "stay proceedings in a State court." 28 U.S.C. § 2283. The injunctive relief sought by Ameritech would run against the ICC Commissioners, not a state court.

Younger abstention is equally inapposite. As a judicially crafted doctrine of comity it, too, is inapplicable where Congress has expressly provided for federal lawsuits. Moreover, while the ICC Defendants' *violation* of federal law remains ongoing, the *proceedings* before the ICC have terminated. JA 96a-124a. This Court has never applied *Younger* abstention to *completed* proceedings of an agency. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 369 n.4 (1989). To do so would effectively impose a revolutionary requirement that parties exhaust all state court remedies before challenging state administrative determinations in federal court. *But see Edwards v. Balisok*, 520 U.S. 641, 649 (1997) (citing a long line of cases holding that "§ 1983 contains no judicially imposed exhaustion requirement").

opportunity to participate in the administration of the 1996 Act is a good example the kind of "gratuity" that the *College Savings* Court said could be validly conditioned by Congress on a waiver of Eleventh Amendment immunity.

A. *College Savings* Reaffirms that States Voluntarily Waive Eleventh Amendment Immunity by Accepting a Federal Benefit Clearly Conditioned on Such Waiver.

Eleventh Amendment immunity is waived by a state's consent to suit. *College Savings*, 527 U.S. at 675-76. In *College Savings*, this Court clarified the conditions that must be satisfied to guarantee that such a waiver is "voluntary" and "unequivocal" when it is effected through the state's acceptance of a federal benefit. *Id.* The Court held that Congress cannot make consent a precondition for a state to engage in an "otherwise permissible activity," because exclusion of a state from such an activity is a "sanction" that "coerces" a state into consenting to suit. *Id.* at 687. Thus, "the voluntariness of waiver [is] destroyed – when what is attached to the refusal to waive is the exclusion of the state from otherwise lawful activity." *Id.* For the same reason, engaging in "otherwise permissible activity" cannot be an unequivocal expression of a state's intent to waive its immunity. *Id.* at 681-83 (overruling *Parden v. Terminal Ry. Co. of Alabama State Docks Dep't*, 377 U.S. 184 (1964)).[26]

---

[26] Waiver of sovereign immunity, like waiver of individual constitutional rights, is effective if it is an "intentional relinquishment or abandonment of a known right or privilege." *College Savings*, 527 U.S. at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). As the Court recognized in *College Savings*, waiver need not be *express* in order to be *intentional*. *See id.* at 678-81.

By contrast, a state's consent to suit is voluntary, and not coerced, when Congress seeks such consent by offering a benefit instead of by threatening a sanction. *Id.* at 686-87. Thus, Congress may validly require a state to consent to suit as a precondition for accepting a benefit, which *College Savings* called a "gratuity." *Id.* One example of a "gratuity" is money offered by Congress pursuant to its Article I Spending Clause powers. *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)). Another is Congress's approval of an interstate compact. *Id.* (citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)). Like disbursement of federal funds, Congress's approval of an interstate compact is a benefit because "States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *Id.*

Thus, Congress may offer states benefits in exchange for their waiver of Eleventh Amendment immunity, and when states accept the benefit the waiver occurs. Indeed, in a companion case to *College Savings*, this Court reiterated that, "subject to constitutional limitations, . . . the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." *Alden*, 527 U.S. at 755 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)).

B. Congress Properly Conditioned State Participation in the Act on Waiver of a State's Eleventh Amendment Immunity.

The Seventh Circuit was correct that the invitation for states to participate in the implementation of the Act is the kind of benefit that Congress may condition on waiver of Eleventh Amendment immunity. Participation in the administration of the 1996 Act is an opportunity that Congress could choose to

grant or withhold at its pleasure, and the states are free to accept or decline the benefit of that participation.

Under the Act, the substantive law applicable to interconnection between telecommunications carriers was substantially "federalized," regardless of whether a state chooses to participate in the administration of those federal requirements. Congress, acting pursuant to its authority under the Commerce Clause to regulate entry into local telephone markets, *see Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91 (1981), "has taken the regulation of local telecommunications competition away from the states . . . [w]ith regard to the matters addressed by the 1996 Act," *AT&T Corp.*, 525 U.S. at 378 n.6.

It follows that administration of the Act's scheme is not an "otherwise permissible activity" in which a state could engage without Congress' permission. Rather, that administration is a benefit conferred upon a state by Congress. As the Tenth Circuit reasoned:

> [W]ith the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. As in *Petty* and *Dole*, Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity.

MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah, 216 F.3d 929, 938 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001); *see MCI-II*, 222 F.3d at 343-44 ("Congress could – and

did – take over regulation of a part of the telecommunications industry in accordance with its Commerce Power. Such regulation is no longer an 'otherwise permissible activity' for states").

For those reasons, assuming Congress was sufficiently clear about the fact that state participation was conditioned on a waiver, there is every reason to treat acceptance of that benefit as a valid waiver of Eleventh Amendment immunity.[27] With respect to commission decisions approving or rejecting interconnection agreements, Congress could not have been more clear. Section 252(e)(6) plainly authorizes review in federal court of such decisions, and section 252(e)(4) meanwhile precludes review in state court. As for enforcement activities, the condition may not be quite as clear, but for the reasons stated in Section I, *supra*, we submit that states still can fairly be said to be on notice that their enforcement actions will be reviewed in federal court if they choose to participate under the Act.

To be sure, a state commission may *want* to participate in every determination under the Act, rather than leave any matter to the FCC, and may prefer not to waive immunity at the same time. But the same is true of any benefit or "gratuity" offered by Congress: states would prefer to have it, and often without the conditions Congress attaches. The desirability of the benefit, however, does not make Congress' invitation coercive rather than voluntary. *See South Dakota v. Dole*, 483 U.S. 203,

---

[27] If Congress had acted sequentially – first preempting all of local interconnection and then a year later authorizing states to participate if they waived their immunity – the application of the "gratuity" analysis would be easy. It cannot make a difference that Congress took both steps in the same Act.

211 (1987) (a gratuity is not "unconstitutional simply by reason of its success in achieving the congressional objective").[28]

Because the ICC voluntarily accepted the benefit of participating in the administration of the 1996 Act and was on clear notice that doing so would subject it to federal court jurisdiction, it waived its Eleventh Amendment immunity with respect to claims that its decisions violate the Act.

CONCLUSION

For the reasons set forth above, the decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

[28] Nothing in the Act requires states to waive their immunity in order to regulate aspects of local telecommunications that are not addressed by the Act. The Act's local competition provisions concern only one narrow (albeit important) slice of regulation: interconnection between competing carriers. *See Puerto Rico Tel. Co. v. Telecommunications Reg. Bd. of P.R.*, 189 F.3d 1, 11-12 (1st Cir. 1999). A state that declines to participate in the regulation of interconnection under the Act can continue regulating the vast bulk of intrastate telecommunications.

DARRYL M. BRADFORD
JOHN J. HAMILL
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

PAUL M. SMITH*
WILLIAM M. HOHENGARTEN
MICHAEL B. DESANCTIS
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

**Counsel of record*

Counsel for Respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services LLC, and Focal Communications Corp.

RICHARD METZGER
MATTHEW BERNS
FOCAL COMMUNICATIONS CORP.
7799 Leesburg Pike
Falls Church, VA 22043
(703) 637-8700

Counsel for Respondent Focal Communications Corp.

THOMAS F. O'NEIL III
WILLIAM SINGLE, IV
BRIAN J. LESKE
WORLDCOM, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

Counsel for Respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc. and MCImetro Access Transmission Services LLC